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No. 90-853

In The

Supreme Court of the United States

October Term, 1990

Bank of Boulder,

Petitioner,

v.

Federal Deposit Insurance Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Did the decision below err in concluding that 12 U.S.C. Section 1823(c)(2)(A) permits the Federal Deposit Insurance Corporation ("FDIC"), as the receiver of a state-chartered commercial bank, to transfer the right to draw on a letter of credit to itself as a United States corporation, notwithstanding that the letter of credit is non-transferable by contract and under uniform state law and international custom and practice, and notwithstanding that the letter of credit satisfies the requirements of 12 U.S.C. Section 1823(e) and *Langley v. FDIC*?

2. If so, did the decision below err in promulgating a novel federal common law rule allowing the FDIC, as the receiver of a state-chartered commercial bank, to transfer the otherwise non-transferable letter of credit to itself as a United States corporation, even though the letter's transfer restriction satisfies both Section 1823(e) and the rule of *D'Oench, Duhme & Company v. FDIC*, and even though the record and prior decisions fail to establish the legislative facts relied upon by the Court?

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE

The American Bankers Association hereby respectfully submits this brief as amicus curiae in accordance with the provisions of Rule 37.2 of the Supreme Court Rules. Both parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the largest national trade association of the commercial banking industry in the United States, having as members national and state-chartered banks, money-center, re-

gional, and community banks, located in all fifty states and the District of Columbia. Member banks of the American Bankers Association hold approximately ninety-five percent of the domestic assets of all commercial banks in the United States. The Association frequently appears as a party or as amicus curiae in litigation over issues having a profound impact upon the industry at large. This case has such an impact in at least two respects.

It is a case involving a letter of credit transaction. A letter of credit is a unique financial device, bearing resemblance to other devices, but necessarily different from them in major respects. It is critical to the utility of the letter of credit in interstate and international commerce that the rules applicable to letters of credit be uniform, readily understood and predictable. The Tenth Circuit in this case, while proclaiming the need for a "uniform" federal rule on the subject, has adopted a rule entirely out of line with the previous understanding of the rules—an understanding which will continue to apply in all cases other than those in which a federal agency becomes involved in a particular transaction after the fact.

This is also a case testing the extent to which the Federal Deposit Insurance Corporation may run roughshod over state laws—a power the Corporation continues to assert expansively—in its efforts to carry out its responsibilities as receiver of insured institutions which fail or which are purchased or merged in lieu of being liquidated. Since federal preemption of state laws is not lightly presumed, that is often a difficult question, and is here. As we show below, the circuits are split on the question. The American Bank-

ers Association, on behalf of its members, has a distinct interest in seeing that such a split is resolved.

STATEMENT

In 1982, one Gil Reed became a debtor of Dominion Bank of Denver, Colorado. His promissory note to the bank was backed by a standby letter of credit issued by your Petitioner, the Bank of Boulder (also of Colorado), in favor of Dominion Bank. At all relevant times, the law of Colorado has provided that a letter of credit is not transferable or assignable unless it so states on its face. Colo. Rev. Stat. § 4-5-116(1). The standby letter at issue in this case did not so state, and in point of fact it expressly incorporated by reference the International Chamber of Commerce's *Uniform Customs and Practices for Documentary Credits* (Pub. 290, 1974 rev.). Article 46(b) of the UCP provides that "[a] credit can be transferred only if it is expressly designated as 'transferable' by the issuing bank."

The applicable Colorado law was by no means unique. It simply tracked Section 5-116 of the Uniform Commercial Code, which is in effect in all fifty states and the District of Columbia. There was also nothing unusual about the incorporation by reference into the contract of the Uniform Customs and Practices. Most of the banking industry has been doing precisely that, as a matter of course, for nearly thirty years. *See* J. Dolan, *The Law of Letters of Credit* (1984) ¶ 6.02.

In September, 1983, Dominion Bank failed, and the Federal Deposit Insurance Corporation was appointed its receiver. In that capacity, the FDIC arranged a "purchase and assumption" transaction whereby Cen-

tral Bancorporation acquired the deposits and all of the highest quality assets of Dominion Bank, with the FDIC keeping the remainder. The Gil Reed promissory note and the Bank of Boulder standby letter of credit did not pass to Central Bancorporation. Over a year after the failure of Dominion Bank, the FDIC tried to draw on the standby letter, but Bank of Boulder refused to honor it, arguing that FDIC could not acquire the letter by transfer or assignment under state law. The United States District Court agreed, but the Tenth Circuit reversed in 1988, and that decision was upheld, after *en banc* rehearing, in August, 1990. The court held that FDIC had the statutory authority to purchase assets of a failed bank under 12 U.S.C. Section 1823(c)(2)(A) and that such authority was not limited to transferable assets. As an alternative basis for its conclusion, the Tenth Circuit ruled that "federal common law" (created by this decision) would yield the same result. The Bank of Boulder filed a timely Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Review By This Court Is Necessary To Resolve A Conflict Among The United States Courts of Appeals

In its Petition for Writ of Certiorari, filed on November 17, 1990, the Bank of Boulder set forth a number of good and valid reasons why the Court should grant the Petition. The American Bankers Association concurs with the arguments in the Petition, but recognizes that no point would be served by our repetition, restatement, or even elaboration upon those arguments.

We therefore limit the scope of this brief to one point. We wish to bring to the Court's attention a Fifth Circuit decision handed down subsequent to the filing of the Petition which makes it even more critical for the Court to review the Tenth Circuit's decision.

On December 6, 1990, the United States Court of Appeals for the Fifth Circuit decided a case entitled *Patterson v. Federal Deposit Insurance Corporation*, 918 F.2d 540 (5th Cir. 1990) which directly conflicts with the decision of the Tenth Circuit for which review is sought here. Both cases involve the interpretation of 12 U.S.C. § 1823; both involve FDIC efforts to escape from the express import of state laws which would clearly bind any private parties to the respective lawsuits; both involved the potential creation of "federal common law" which would allow the FDIC to override state law; both involve the application of the same three Supreme Court precedents—*Langley v. FDIC*, 484 U.S. 86 (1987), *United States v. Kimbell Foods*, 440 U.S. 715 (1979), and *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). And yet the two cases reach contrary results.

In *Patterson*, the plaintiff borrowed money from the Western Bank of El Paso, Texas. She executed a promissory note secured by a Deed of Trust lien on certain real property in El Paso, but the loan was *not* for the purchase of the real property. When Patterson eventually defaulted on her promissory notes, she sought a declaratory judgment in court invalidating the deed of trust because it encumbered her "homestead," and the Texas Constitution specifically provided that "[n]o mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor." Tex. Const. Art. XVI,

§ 50. It was quite clear that *if* the real property was, in fact, her "homestead," she would have had a valid defense, under state law, to enforcement of the lien by the bank. However, by the time of default, the bank had failed, and had been taken over by the FDIC. The FDIC sought to avoid the application of state law, as it has in this case, by arguing that federal law governed the suit and state law could not be considered. The court rejected the argument:

> It is undisputed that federal law generally governs this suit; and accordingly, § 1823(e) would govern if it applied to Patterson's homestead claim arising under Texas law. However, looking exclusively to federal law does not dispose of this case. There is no federal homestead law and we decline FDIC's invitation to fashion one.

Patterson v. FDIC, 918 F.2d at 544.

In this case, there is no federal letter of credit law, either, so Section 1823 does not dispose of this case. Section 1823(c)(2)(A) of Title 12 U.S. Code provides that the FDIC has the authority to purchase "any . . . assets" of an insured bank in order to facilitate a merger or consolidation of the insured bank. Here, the "asset" in question was a promissory note backed by a letter of credit; in *Patterson*, it was a promissory note backed by a security interest in property. In both cases, there is no question about the validity or enforceability of the promissory note—only that which backs up the note. Whether and to what extent that backup constitutes an "asset" is the issue in both cases. The federal law does not define "asset" by its own terms, so a definition must be found. The Tenth Circuit refused to look to state law to supply

content to that term in this case, whereas the Fifth Circuit *relied* upon state law to find that the "lien" was not enforceable in the *Patterson* case.

With respect to the possible creation of "federal common law" to supply an answer, both courts acknowledge that *United States v. Kimbell Foods* is the applicable Supreme Court precedent, but then go off in different directions in implementing it. *Kimbell Foods*, *Patterson* and *Bank of Boulder* all deal with the claimed need for a uniform federal rule as a justification for creating federal common law, but oddly enough the two lower courts reach conclusions directly opposite what one would expect, given the facts of the respective cases. In the *Bank of Boulder* case, the rule against transferability of letters of credit is already uniform, and the Tenth Circuit acknowledges that this is so, at least as far as "ordinary commercial parties"[1] are concerned. The applicable provision of the Uniform Commercial Code is everywhere in effect. In *Patterson*, however, there is no claim that a Texas-style homestead law represents the law of any jurisdiction other than Texas. Yet for the Fifth Circuit, it is good enough that the Texas law is "well-established." *Patterson*, 918 F.2d at 544.

Kimbell Foods, *Patterson* and *Bank of Boulder* also all deal with the possible frustration of federal objectives by the application of state law as a reason for creating federal common law. In *Bank of Boulder*, the Tenth Circuit relies upon what it concludes are the various hardships application of state law would impose upon the FDIC: FDIC, for example, "would be forced to examine every asset in detail and review

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[1] Pet. for Cert. App. at 17a.

and analyze varying laws to locate possible restrictions" (Pet. for Cert. App. at 18a-19a).[2] But the letter of credit in this case made no claim that it was transferable or assignable. To the contrary, by its incorporation by reference of the Uniform Customs and Practices, it supplied an easily available source of information to anyone in the least familiar with banking practice (certainly including the primary federal regulator of state-chartered banks) to discover whether the letter was transferable or not. In contrast, in *Patterson*, the Fifth Circuit was faced with a deed of trust lien which specifically, emphatically, and on its face disclaimed any reliance upon the Texas homestead law. The court, nonetheless, found no basis for concluding that FDIC's purposes and objectives were hampered. Relying upon *Langley* and *D'Oench, Duhme*, the court found that Patterson was not asserting a defense based upon some sort of secret agreement or off-the-record representation which could have deceived banking authorities. Rather, she was relying upon a Texas law that was there for all to see.

Finally, *Kimbell Foods*, *Bank of Boulder* and *Patterson* all deal with the possible disruption of commercial relations predicated upon state law in the event that a federal common law is created. The Tenth Circuit discounts this third part of the test, concluding that "[p]arties cannot reasonably expect to carry on

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[2] As the Petition for Writ of Certiorari points out, there is no *evidence* in the record that any of this presents any difficulty to the FDIC. Rather than relying upon *evidence* of facts, the court relied upon prior judicial decisions which—in those very different cases—had found certain facts. The Petition likewise points out that the facts are different in this case.

normal commercial relationships at that point" (i.e., after an insured bank has failed). Pet. for Cert. App. at 19a. The Fifth Circuit, on the other hand, relies "especially [upon] the disruption of state commercial relationships" in declining to establish federal common law. *Patterson*, 918 F.2d at 544.

CONCLUSION

The Tenth Circuit and the Fifth Circuit, in separate cases, have construed 12 U.S.C. Section 1823, specifically with a view toward determining whether state law supplies any content to that section of federal banking law in a case where the FDIC acquires and attempts to collect "assets" of a failed insured bank. Point by point, they have reached diametrically opposed results, leaving both the FDIC and the banking industry at a loss in deciding, for the future, what are the applicable rules in this increasingly too common occurrence. The Supreme Court should grant the Petition for Writ of Certiorari in order to resolve this dispute.

Respectfully submitted,

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